EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Dstv. 6/7 PAGE 17 Rr
SL 6

NO. 86-6884 (4)

ORIGINAL

Supreme Court, U.S.
FILED
JUN 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

_____TERM,1987

ELBERT WELCH,

PETITIONER

VS.

HAROLD J. SMITH,SUPERINTENDENT,ATTICA CORRECTIONAL FACILITY;AND MS. FRANCES MILLS,CHIEF OF_MENTAL HYGIENE DEPARTMENT

RESPONDENTS

REPLY BRIEF

REPLY BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ELBERT WELCH
#76-C-567
IN PROPRIA PERSONA
ATTICA CORRECTIONAL FACILITY
BOX 149
ATTICA,NEW YORK 14011

13 pp

TABLE OF AUTHORITIES

Bounds v Smith,430 US 817(1977)

Bradshaw v Zoological Society of San Diego,662 F2d 1301(9th Cir. 1981)

Caston v Sears,Roebuck & Co.,Hattiesburg,Miss.,556 F2d 1305(5th Cir. 1977)

Cobbledick v United States,309 US 323 (1940)

Dickinson v Petroleum Conversion Corp.,368 US 507(1950)

Eisen v Carlisle & Jacquelin,417 US 156 (1974)

Firestone Trie & Rubber Co. v Risjord,449 US 368,101 S. Ct. 669(1981)

Hodge v Colon,802 F2d 58(2d Cir. 1986)

In re Continental Investment Corp.,637 F2d 1 (1st Cir. 1980)

Mathews v Eldridge,424 US 318(1976)

Merritt v Faulkner,697 F2d 761(7th Cir. 1983)

Radio Station WOW,Inc. v Johnson,326 US 120 (1945)

Richardson-Merrell,Inc. v Koller,472 US 424 (1985)

Robbins v Maggio,750 F2d 405 (5th Cir. 1985)

United States v McDonald,435 US 850 (1978)

United States v Proctor & Gamble Co.,356 US 677(1958)

United States v Ryan, 402 US 530 (1971)

Wood v Breier,54 F.R.D. 7 (E.D.Wis. 1972)

REASONS FOR GRANTING WRIT

ARGUMENT (REPLYING TO RESPONDENTS' OPPOSITION BRIEF)

Respondents argue in their opposition brief to the writ of certiorari that, inter alia, in light of this Court's strong expression of concern with avoidance of piecemeal litigation in Richardson-Merrell, Inc. v Koller,472 US 424 (1985), the few circuits dissenting would be hard-pressed to adhere to their views were the question involved here presented anew. (Opp. Br.,p. 6). Respondents claim that Petitioner's case presents a clear example of delay involved in immediate appeals since there has been a delay of nearly three years since the magistarte denied the motion for appointment of counsel on July 18,1984. (Opp. Br.,p. 8,n. 6). Respondents concede, however, that there is a conflict among the circuits on the issue presented herein. (Opp. Br.,p. 5).

Respondents also argue that the district court order involved here did not foreclose renewal of petitioner's request for appointment of counsel at a later stage of the litigation; that the issue is not separate from the merits since it can be remedied by a post judgment appeal,reversal and new trial,etc. (Opp. Br.,pp. 8-11)

This brief is submitted to discuss the issues of the piecemeal policy, effective review and irreparable injury, and the final judgment rule in light of Respondents' claims.

SEPARABILITY

By examination of the relation between the substance of the order denying appointment of counsel and the merits of the cause of action itself, it becomes abundantly clear that the order is "separable from, and collateral to" the merits. It does not involve claims of right asserted in the action per se; and the order is clearly too independent of the cause to require that appellate consideration be deferred until the whole case is adjudicated. See Bradshaw v Zoological Society of San Diego,662 F2d 1301, at p. 1307 (9th Cir. 1981) (discussed in Petitioner's original petition).

It is obvious,too, that the decision denying appointment of counsel is not merely a "step" towards final judgment on the merits. The issue concern Petitioner's need for assistance of counsel to enable him to present his case to the district court, in the absence of which Petitioner will surely have little hope of successfully doing.

Indeed, in a November 26,1979 order granting Petitioner leave to proceed in forma pauperis in this matter, Judge Elfvin found that Petitioner stated a non-frivolous claim of interference with federally protected rights to access to courts regarding the denial of access to the transcripts that formed the basis of the reversal

and dismissal of the criminal case at issue. Since the order has clearly reached the merits of the cause insofar as the merits are discussed or germane to the issues on this appeal, the Court of Appeals may simply refer to that order to satisfy any requirement that the merits be considered.

Altough the magistrate's decision did briefly refer to the merits of the case as Respondents point out (Opp. Br.,p.9,n. 7), and although Petitioner does discuss very briefly a certain aspect of the merits, the order and discussion are only indirect and incidental; further, Petitioner discusses only a certain aspect of his claims. The order and discussion are not in any manner dependent on the merits in such a way as to render the district court's order unappealable as a collateral order and does not require the Court of Appeals to become "enmeshed" in the issues involved in a determination of the merits.

EFFECTIVE REVIEW AND IRREPARABLE INJURY

There are two aspects to the reviewability question. The concerns are, first, that "crucial collateral claims (will) be lost. . ." Firestone Tire & Rubber Co. v Risjord,449 US 368,(1981) (quoting Matthews v Eldridge,424 US 318,331, n. 11 (1976)); and, second, the need to construe the finality requirement "so as not to cause. . .potentially irreparable injuries to be suffered." ibid,

An appealable order must involve an "asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial" United States v McDonald,435 US 850,860 (1978). The claimed right must be such that "denial of immediate review would render impossible any review whatsoever. . ." United States v Ryan,402 US 530,533 (1971)

Petitioner must show that the order necessarily causes injury that will be irreparable unless appealed immediately.

The Ninth Circuit in Bradshaw,supra, 662 F2d at 1312 noted that the denial of counsel to litigants creates the same clear threat of irreparable injury in all cases:

> . . .it is not difficult to imagine--indeed, it is impossible to ignore--the irreparable injury that would result from a refusal to review an order denying a civil rights litigant appointment of counsel. Because the likelihood that an appellant in Miss Bradshaw's position will be unable to proceed through trial and obtain effective review of the order is so high, and the prejudice inherent in proceeding to trial without counsel is so great, we do not view the injury that would inevitably result from a refusal to review the order before us as speculative or hypothetical.

id.,ubi supra.Confer Caston v Sears,Roebuck & Co.,Hattiesburg,Miss., 556 F2d 1305,1308 (5th Cir. 1977):

> Obviously,the refusal to appoint an attorney is collateral to the merits of the case. The decision to deny the assistance of an attorney to a layman unschooled in the law in an area as complicated as the civil rights field is truly too important to be deferred until a resolution on the merits can be had. Such an individual likely has little hope of successfully prosecuting his case to a final resolution on the merits.

ibid. Robbins v Maggio,750 F2d 405,412(5th Cir. 1985),accord.

Petitioner's case sub judice presents an even more compelling case than the preceding ones and the irreparable injury here is much clearer; for Petit ner in the instant case is prevented from filing a pretrial statement under Rule 16D of Loc.R.Prac.,W.D.C., indicating the witnesses,their testimony and physical exhibits to be offered in evidence at trial,all because the district court here refused to appoint counsel to aid Petitioner in securing evidence material and essential to presentation of his case during this discovery phase of the case. Filing a pretrial statement under Rule 16D is mandatory; but even if it were not,Petitioner will suffer irreparable injury if he is required to proceed to trial without the indicated evidence pertaining to the state criminal matter and the indicated essential witnesses.

This case is presently in the discovery stage in the district court; and it has long been held that it is essential in any civil rights case that the plaintiff be given every reasonable opportunity develop and fashion a remedy for any grievance he may legitimately harbor. And the federal rules of discovery are meant to insure that no relevant fact remain hidden.*** See Wood v Breier,54 F.R.D. 7,13 (E.D.Wis. 1972);cf. United States v Protor & Gamble Co.,356 US 677 682 (1958)("a trial (should be) less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest extent"). (FOOTNOTE CONTD. ON NEXT PAGE)

***Respondents claim that Petitoner's preoccupation with a "secret" order reversing his conviction is frivolous as noted by the magistrate. (Opp. Br.,p. 9,n. 7). Such "secret" order in fact exists and claims of privilege against disclosure are being made pursuant to Section 90,subd. 10, of N.Y.S. Judiciary law by both the Appellate

THE FINAL JUDGMENT RULE

The finality requirement encompasses a number of specific policies ofter lumped together under the pejorative heading of "the policy against piecemeal review". In re Continental Investment Corp.,637 F2d 1,6(1st Cir. 1980). First it "emphasizes the deference that appellate courts owe to the trial judge" Firestone,101 S. Ct. at 673; or, conversely, confines the courts of appeal to their proper task of reviewing, rather than supervising, the work of the district court;second, the finality requirement avoids "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise. . ." Cobbledick v United States, 309 US 323,325(1940). The final concern is with avoiding "the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." Eisen v Carlisle & Jacquelin,417 US 156,170 (1974).

As to the first concern,the unequivocal nature of the district court's refusal to appoint counsel is plain; the decision was final in this respect. Nor will a determination on this appeal in any

(FOOTNOTE CONTD. FROM PREVIOUS PAGE)

*** Division,Fourth Department and the Grievance Committee,Fourth Department as to the information pertaining to the reversal as well as the disciplinary action taken against the trial judge and culpable defense attorney. If Petitioner is not appointed counsel to assist in securing this evidence during this discovery stage,he will not be able to present his case to the district court for the reasons aforesaid. Petitioner must file a pretrial statement prior to trial and in the absence of this evidence he cannot do so. This clearly will irreparably injure Petitioner because his case may well be dismissed because of this. As discussed herein, this consideration should outweigh any concerns of inconvenience or piecemeal review.

way interfere with the future actions of the trial judge since a determination as to appellant's entitlement to appointment of counsel does not affect the trial judge's ruling on the merits. Compare Bradshaw,supra,662 F2d at 1314.

As to the second concern, the order at issue eliminates any basis for suspicion that the appeal has been interposed to harass or for mere tactical reasons. Petitioner's need for counsel is genuine and,indeed, was occasioned by the failure of respondents to comply with Petitioner's discovery demands in the district court. As is argued herein and in the original petition, Petitioner has little hope of successfully prosecuting his case to a final resolution on the merits in absence of the evidence and information sought through discovery in this case. There is absolutely no basis upon which it can be said that Petitioner appealed the order to obstruct "just claims"; rather, he did so to vindicate his rights. Compare Bradshaw,supra, 662 F2d at at 1315.

The last concern involves a tension that sometimes exists between allowing immediate review and avoiding delayed resolution of the overall cause of action; and a legitimate concern over the potential misallocation of judicial resources. Justice Frankfurter observed: "This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice." Radio

Station WOW,Inc. v Johnson,326 US 120,124 (1945)

As the Ninth Circuit noted, where plaintiffs are erroneously denied the assistance of counsel,the policy of judicial economy is clearly served by permitting an appeal immediately from the order denying counsel. Bradshaw,supra, at p. 1315. Petitioner's case at bar presents a clear example; for only by affording counsel now can this Court assure that Petitioner's right under due process requirements and First Amendment requirements to present his case to the district court will be protected.*** The appointment of counsel would also relieve Petitioner, the Respondents, and the court alike, from the need to muddle through a sham of a trial, subsequent appeal, and another trial and appeal following the appointment of counsel. The first trial in Petitioner's case would be meaningless and in an important sense, this case does not involve a mere prospect of relitigation, but rather the prospect that any meaningful litigation must await appointment of counsel that is at issue here. cf. Bradshaw,supra, at p. 1315,n. 36.

The alternative of denying review would only assure that justice is delayed, and more likely denied, and guarantee that the resources of the court and the parties would be senselessly dissipated in the process. The Supreme Court has recognized that considerations of judicial economy, usually thought to be opposed to, and there-

***Petitioner emphasizes that 28 U.S.C.,#1915(d) must be understood to guarantee indigents "meaningful access" to the courts as required by the constitution. See Bounds v Smith,430 US 817,823(1977);cf. Hodge v Colon,802 F.2d 58,at 60 (2d Cir. 1986),Merritt v Faulkner, 697 F2d 761, at 763(7th Cir. 1983)

fore to be balanced against, allowing immediate review, may give way in view of the potential harm attendent on delaying review of the order: Among "the considerations that always compete in the question of appealability, the most important. . .are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." Dickinson v Petroleum Conversion Corp.,338 US 507,511 (1950)(footnote omitted) The potential harm attendent on delaying review here is plainly such as to outweigh concerns of inconvenience and piecemeal review.

The Ninth Circuit also observed that judicial economy will generally be served by permitting an appeal from such orders since affirmance on appeal may well cause such plaintiffs to abandon their case rather than proceed through trial in an obviously hopeless cause; this is especially true where the court of appeals affirms that plaintiff cannot make even the minimal showing of merit necessary. However,absent review and affirmance, there is a strong possibility that plaintiffs will attempt to survive a trial without counsel, in hope that when they lose,they will obtain a lawyer and a new trial through post-trial appeal, and ultimately will have the opportunity to persuade the court of appeals of the merit of their claim. See discussion in Bradshaw,supra, at pp. 1315-1316.

In sum,Petitioner submits that considerations of judicial economy, the potential harm on delaying review and other factors relevant to determining the appealability question presented here,

all militate in favor of allowing direct appeal from orders denying appointment of counsel. In any event, a direct precedent by this Court to resolve the conceded conflict among the circuits on the issue seems highly desirable.

The decision of the Second Circu it is concededly in conflict with other circuits on the appealability issue; Petitioner believes the Second Circuit has decided the appealability issue of collateral orders in a manner in conflict with applicable decisions of this Court; and Petitioner believes that the Second Circuit has decided the appealability issue which is an important question of federal law which has not been, but should be, settled by this Court. For these reasons, this Court should grant the writ of certiorari to review the judgment of the Second Circuit Court of Appeals.

DATED: JUNE 28th ,1987
ATTICA CORRECTIONAL FACILITY

RESPECTFULLY SUBMITTED;
Elbert Welch
ELBERT WELCH #76-C-567
IN PROPRIA PERSONA
ATTICA CORRECTIONAL FACILITY
BOX 149
ATTICA,NEW YORK 14011